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STATEMENT IN REPLY

TO THE

Suggestions of the Interstate Commerce Commission of March 16, 1892.

By JOSEPH NIMMO, Jr.

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Mr. Nimmo's Reply to the Suggestions of the Interstate Commerce Commission of March 16, 1892.

HON. S. M. CULLOM,
Chairman of Senate Committee
on Interstate Commerce.

DEAR SIR: I beg leave to submit to you a few thoughts suggested by reading the suggestions of the Interstate Commerce Commission of March 16, 1892.

In replying to my argument of Feb. 23, 1892, the Commission comments upon the fact that I did not "disclose just what in his (my) opinion the functions of governmental commissions in the regulation of commerce by railway should be." That is true; and I regard it as a laudible criticism, since it suggests an advancement of the argument toward its real merits. My only reason for refraining from such full disclosures of opinion was the fear of trespassing too far upon the time and attention of your Committee. Following the suggestion of the Commission, however, I will now endeavor to state to you my general views upon the subject of the regulation of the railroads as fully as may appear to be proper in this connection.

I earnestly favor the suppression of unjust discriminations, rate cuttings, and every other species of evil which tends to demoralize railroad traffic and to create disorder in the conduct of the commerce of this country. Two kinds of reform measures are, in my belief, absolutely necessary in order to accomplish that result; First, meas-

ures in the nature of self-control to be adopted by the railroad companies, and, second, clearly defined and practical provisions of law whereby the evils referred to may be suppressed in a manner conformable to justice and to the principles upon which our government is founded. That comprises my general confession of faith touching the regulation of commerce over railroads.

Just here it seems proper that I should state, with some degree of precision, what I mean by *reform measures in the nature of self-control, to be adopted by the companies.* In my argument I alluded to the fact that the American railroad system is mainly a resultant of the interaction of commercial and economic forces which overshadow the railroads. These forces are not only superior to the power which can be exercised by any railroad company, but also superior to the power which can be exercised by any combination which may be entered into among the companies. In a word, the American railroad system is not a product of railroad combination, and it cannot be controlled by railroad combination. It is the product of an evolution. Therefore, I strenuously maintain that it is incumbent upon the companies to conform to the clearly evolved organic laws of the American railroad system. This necessarily involves the preservation of the orderly conduct of the transportation interests of this country through the observance of rules and regulations in the nature of self-restraint. This is a great work, and it is progressing. It requires time for its full consummation. The splendor and the wonderful degree of efficiency to which our railroad system has attained are results of conformity to the clearly evolved organic laws of its being, and the rules and regulations in the nature of self-restraint referred to are expressions of a careful conformity to the lessons of experience. I believe this to be history and the philosophy

of history. It controls my thought upon this great question.

In order to set this matter in a clear light, I beg leave to invite your attention to some of the particular restraints to which the companies have been forced to submit themselves in the course of the evolution of the American railroad system, in consequence of the striking peculiarity of the railroad as a highway of commerce, namely, the fact that it is an avenue of commerce, the pathway of which is no wider than the wheel of the vehicle which moves upon it.

First. I would mention the requirement as to the publicity of the rates of transportation on railroads. This is a restraint upon the carrier, which was never dreamed of before the days of railroads, and which is not and never was imposed upon carriers on free highways of commerce—*i. e.*, wagon roads, canals, and natural navigable waters, where the influence of railroad transportation is not dominant. And yet everybody concedes the absolute necessity of such restraint for the purpose of securing the orderly conduct of transportation on railroads. Besides, the Interstate Commerce Act requires it.

Second. Timely notice of the raising and lowering of rates is a severe restraint upon the railroad carrier. It is not, and never was, imposed upon carriers on free highways. But experience has proved the justice and the absolute necessity for the observance of this rule in the conduct of railroad transportation, and the Interstate Commerce Act requires it.

Third. Uniform classification of freights in order to form railroad freight tariffs which may become a ready reference to freight charges would be regarded not only as an absurdity, but as an outrage upon the freedom of commerce on the ocean and on other free highways of

commerce, where the influence of railroad transportation is not dominant. But such classification is necessary in the conduct of railroad transportation, and the Interstate Commerce Commission has thrown the full force of its influence in favor of this self-imposed regulation of railroad traffic.

Fourth. The forming of connections between the tracks of different companies whereby the American railroad system sprang into existence as a great national autonomy in the work of transportation was the overshadowing cause of innumerable restraints and constraints upon individual railroad management. This I explained in my argument of Feb. 23. Connecting the tracks of the different companies has also compelled the adoption of a thousand facilities for uninterrupted freight and passenger traffic, and for mail transportation not possible on free highways of commerce. The act of June 15, 1866, involved all this, and I think no voice has ever been raised against the practical results of its operations in any part of this country.

The chief end and aim of the various self-imposed restraints and constraints upon railroad management is *the maintenance of agreements as to rates.* To this reform, inaugurated by the railroad companies under the compulsion of the logic of events, the Interstate Commerce Commission is fully committed. But it is a reform which has been only partially wrought out. Evasions and direct violations of rate agreements constitute to-day the persistent and most flagrant cause of unjust discriminations. The prevention of such discriminations is the fundamental object of the Act to Regulate Commerce. But I strenuously maintain that the suppression of unjust discriminations is primarily the duty of the companies through agreements in the nature of self-control, and that it is the

concurrent duty of the Government to sustain the companies in such efforts for securing the just and orderly conduct of the American railroad system. This concurrence of action in the great work of regulating railroad traffic is a thing not yet fully attained unto. I can conceive of no larger, more practical, or more beneficent work for the Interstate Commerce Commission than that of sustaining and defending such measures.

The full consideration of all the restraints and constraints and enforced facilities for transportation and travel which characterize the American railroad system and which constitute the essential law of its operations would far transcend the proper limits of this communication. Those characteristics of railroad transportation are in no sense the outcome of governmental devisement. No legislative body and no railroad commission ever conceived them or established them. The compulsion of a mighty evolution alone has forced railroad managers to submit to the obvious requirements of such restraining and constraining conditions. Any attempt to set at naught the law of railroad development enforced by these governing conditions would be as absurd as a proposition to abolish all statutory enactments and remit men to their natural rights.

And now I think I have said enough in order to indicate to you pretty clearly what I mean by *reform measures in the nature of self-control to be adopted by the companies.*

Experience has taught very much in the line of a just and proper conformity to the peculiar conditions which constitute the being and the environment of our railroad system, and yet much remains to be done in this direction in order to prevent the evils which are incident to an unbridled competition between rival lines; a strife which, if unrestrained, invariably runs to disorder, both in the conduct of transportation and of commerce. Such tendency

to disorder arises mainly from the fact that there is a constant demand for new lines and for increased railroad facilities in order to meet the rapidly developing needs of the country for transportation facilities, while at the same time there is an enormous and rapidly increasing surplus of transportation facilities at the great trade centres. It is just here, at the trade centres, and at other chief sources of traffic, where the fierce struggles for traffic arise—here is where unjust discriminations, rate-cuttings, and all sorts of abuses have their origin. From thence these evils project their disturbing influence to the extremities. The fight at the trade centres is for the largest possible share of the traffic. Control this bitter and relentless fight by measures in the nature of self-restraint, so that each line can have what may be determined by some equitable arrangement to be its proper share of the competitive traffic, and the chief cause of rate wars, unjust discriminations, and general disorder will be removed. This is a sort of restraint upon the freedom of railroad transportation which, like the various other restraints hereinbefore mentioned, is not only justified, but absolutely enforced by the peculiarities of the railroads as a highway of commerce. It is in vain to attempt to put a stop to the evils and mischiefs of unjust discriminations, and rate-cuttings, until their inciting cause is brought under control. When that is done governmental regulation will become practicable and easy without "treating the railroad interests as constituting in a certain sense a section by itself of the political community," or by having recourse to governmental rate-making, or to any other revolutionary proceeding.

There is another most desirable object which would be attained by a perfect system of agreements as to the division of competitive traffic, and that is the protection of the weaker lines from absorption by the stronger lines. I

know that this is a state of affairs which the managers of some of the greatest railroads in this country deprecate. They declare that they are now forced to the absorption of lines by strategic necessities and not by sound commercial or economic considerations. I mention this to you as a subject worthy of the earnest consideration of your Committee.

Just here I desire to acknowledge the fact that it was by reading the chapter of your Report on Interstate Commerce, pages 198 to 202, that I was first impressed by the force of this whole doctrine of basing a scheme of regulation upon the restraints which, in the nature of things, must be imposed upon railroad transportation in consequence of the marked peculiarities of the railroad as a highway of commerce. The chapter alluded to contains, in my opinion, the rationale of a system of just and beneficent regulation, and I believe, also, that when such a system of regulation has been inaugurated it will fully realize the conception of Mr. Chief-Justice Waite as to "extending the law to meet this new development of commercial progress."

And now I turn to the general subject of governmental control. I believe there is to-day more need of sensible and efficient means of governmental control of the abuses of which I have spoken than there was when the Act to Regulate Commerce was enacted. I am informed that in certain parts of the country rate-cutting is now rampant, and that there is danger that it may lead to a general demoralization in the freight traffic of the country. I believe you have always regarded the Act to Regulate Commerce as a tentative measure, and I know that you have carefully read the instructive lessons of experience of the last five years under the operation of that act. I profess to be as sincerely in favor of suppressing the evils above men-

tioned as is any railroad commissioner in this country, State or national, and I have joined issue with the Interstate Commerce Commission simply from a belief that it has recently committed itself to what I regard as un-American and impractical methods and expedients, and from a conviction that the first thing to do in the attempt to move in the right direction is to stop going in the wrong direction.

The conclusion to which I arrive in regard to the general subject of railroad regulation is that it should begin with not only allowing but urging the companies to conform their methods and practices to all the wholesome restraints, in the nature of self-control, which have been proved by the unmistakable lessons of experience to be just and beneficial and promotive of good order in the conduct of the commercial and transportation interests of the country. At the same time clearly defined governmental regulation of the railroads should supplement such measures in the nature of self-government. That seems to express the idea of liberty regulated by law, which distinguishes our political institutions—an idea which, in a sincere and well-founded national pride, we may characterize as Jeffersonian Americanism.

Let us never for a moment lose sight of the important principle of true Americanism, that the development of the commerce of this country must proceed along the line of the interaction of forces, that it must be essentially a free commerce, and that governmental supervision and direction of the commercial and industrial interests of this country can go no farther than to secure to all men everywhere the right to live and labor in an open field and in a pure atmosphere. Any exercise of governmental authority which transcends that limit in the name of commercial regulation will surely be spurned by a liberty-loving people.

I firmly believe that only by such modes of procedure as I have here in a general way attempted to describe can unjust discriminations, rate-cuttings, and all other evils and "mischiefs" be reduced to a minimum and the work of the Interstate Commerce Commission be rendered practical and beneficial.

Thus I have attempted to comply with the suggestion of the Interstate Commission, that my argument ought to disclose "just what the functions of governmental commissions should be." If the Commission shall not regard this explanation as an adequate one, I will frankly confess that it appears to me like the merest outline of a very great subject, the merits of which I sincerely hope may be more fully unfolded in future discussion. I shall be glad to elaborate my views upon the subject whenever called upon to do so. However, I feel constrained to add that this is a subject the proper investigation and public discussion of which the Interstate Commerce Commissioners have sadly neglected, and also to express the opinion that if they had given to it the attention which it deserves they would probably have avoided errors into which they have been plunging during the last two years—errors which, if persisted in, will inevitably result in wrecking the Commission and the Interstate Commerce law. This I shall endeavor to explain.

The Impolicy of Governmental Rate-Making.

My objections to the course being pursued by the Commission are, first, that it seeks to control rate-making in the conduct of the interstate commerce of the United States. That would be to endow the Commission with autocratic powers over the commercial and industrial development of this country. But that can never be tolerated in this

country. There are two distinct classes of railroad regulations which now command the earnest consideration of the American people: *First*, regulations prohibiting and punishing manifest wrongs; and, *second*, regulations having for their object the control or direction of railroad operations. This latter kind of regulation has, as its most concrete expression, the asserted right of rate-making. The difference between these two kinds of regulation is that between restraining bad men from going wrong and directing honest men how to conduct the legitimate businesses of life. It also marks the distinction between liberty regulated by law and unmitigated despotism. I strenuously maintain that the railroad problem of to-day does not involve any question as to the power of the Government, but that it is purely one of public policy, and as such, by every established principle of our democratic form of government, by every sound reason of economy, and by every valid consideration of commercial freedom, confined to the prevention of wrongs.

Governmental rate-making is impossible, for the reason that it is a superhuman work. The farther the Commission go into such an undertaking, the more appalling will appear the task. I strenuously maintain that a commission composed of men of the highest order of ability, distinguished for legal knowledge, and of large experience in the management of railroad freight traffic would be absolutely incompetent to the performance of such a duty. If the Interstate Commerce Commission shall ever succeed in securing the power of rate-making involving as it would, the control of the course of the commercial and industrial development of this country, it will not be long thereafter that its members will be forced to the confession of *Edyrn*, son of *Nudd*, in the days of King Arthur:

"For once when I was up so high in pride
That I was half-way down the slope to hell."

The internal commerce of this country is not a steady-going, invariable thing, moving in one great current, with fixed laws and clearly defined limitations. On the contrary, it is widespread and consists of many exceedingly variable and capricious movements. Interpose a barrier here, and away off at some distant point an outlet will be found. Such manifestations of the freedom of commerce cannot be restrained. As well attempt "to dam up the waters of the Nile with bulrushes."

Political Objections to Governmental Rate-Making.

The political objections to governmental rate-making are also insuperable. Such a power, if freely exercised, would inevitably partake of the essential and unavoidable attribute of governmental sovereignty, with all the responsibility and exclusiveness attaching to the exercise of such power. The office of the Interstate Commerce Commission would in such case become a veritable Oklahoma of claimants for favor, each seeking reduction in rates in order to even up with some more favored person, locality, or commodity somewhere, however well justified the discrimination might be by economic and commercial circumstances and conditions. The political torrent of appeal would end only in some grand levelling process, which the Commission would be powerless to resist.

Certain Errors into which the Interstate Commerce Commission has Fallen.

The root of all the errors into which the Interstate Commerce Commission has fallen is found in the fact that that

body persistently refuses to recognize the overshadowing and all-important fact that the American railroad system exists to-day as a great and beneficent organization by virtue of mutual agreements between the companies, enforced by the commercial necessities of the country, and that self-restraint and self-government among the companies must constitute the substantial basis of any true and effective railroad reform.

The Commissioners also appear to be struggling with a confusion of ideas in regard to the general principles upon which the governmental regulation of rates should be based. They seem to think that the adjustment of rates can be figured out from some such economic considerations, as that a reduction of rates may so develop traffic as to increase net earnings. That is, presumably, a matter which may safely be left to the quick-witted men who are employed by railroad companies to make rates. It is for that specific purpose that they hold their places. Whenever net income can be increased by reducing rates, it is pretty certain that rates will be reduced. The impracticability of trying to figure out the adjustment of rates from economic computations as to cost of road and cost of transportation services is now pretty generally recognized. The supreme court of the State of Illinois expressed an opinion of that sort about sixteen years ago.

The Interstate Commerce Commission in its apparently contradictory views seems to have hit upon the correct idea of adjustment on page 10 of their "Suggestions," but not hard enough, I fear, to set their course in the right direction. The words alluded to are as follows :

"It is freely conceded that many practices of the carriers, and many of the principles adopted by them in the

establishment of tariffs and classifications, which seem at first blush to be purely arbitrary and unjust, are found on examination to be perfectly just, and founded on the strongest reasons of public expediency and commercial necessity."

This seems to express the general fact that the relative adjustment of rates on *commercial considerations* and not on presumed *economic* considerations or fancied considerations of public policy points to the best solution of the question of regulating rates. That corresponds with the conclusion at which you arrived as the result of your thorough investigation of this great subject during the years 1885 and 1886. In your Report on Interstate Commerce, submitted to the Senate January 18, 1886, you say, at page 182, that nearly all of the eighteen classes of complaints which you enumerated on pages 180 and 182 " are based upon the practice of discrimination in one form or another." It seems now to be pretty generally conceded that the subject of governmental regulation is, as you then regarded it, essentially one of relative rates, and that the determination of what constitutes a fair adjustment of relative rates is essentially a commercial question. When the companies are allowed or required to submit themselves to all the proper restraints necessary in order to relieve their general management from the duress imposed by the dark cloud of rate war which is constantly lowering over their heads, then, and not until then, may we expect to see their general adjustment of rates become, in the language of the Commission, " perfectly just and founded on the strongest reasons of public expediency and commercial necessity."

And now I beg leave to invite your attention to some comments upon the " Suggestions " of the Interstate Commerce Commission, dated March 16th, 1892.

The last sentence of the first paragraph of the "Suggestions" of the Commission reads as follows:

"The commercial development of the country has outgrown the capacity of the common law and the ordinary judicial tribunals to adapt themselves, under certain circumstances, to the complete and effective administration of justice."

This, to my mind, is an unproportioned thought. It is imaginative rather than deductive. Consider for a moment the idea of discarding the common law and the judicial system of our country in order to conform our system of railroad regulation to the rather crude ideas of a body of men who have not yet had time fully to master all the economic and commercial conditions of the subject which they have in hand. An experience of twenty years as an officer of the Government at Washington, mainly in the study of this very subject, convinced me that there is no official road to knowledge. True enough, "the commercial development of the country has outgrown the capacity of the common law." But let the commissioners go to the "old Roman," Judge Thurman, whom Senator Conkling in the Senate of the United States characterized as the ablest exponent of the common law in this country. He will say to them, as he has publicly said, that the common law is a thing capable of indefinite adaptation to the demands of the new experiences of this country. Let the Commission try to interpret the lessons of experience, and to formulate those lessons into law, and they will have less occasion to discard the common law, or to doubt the capacity of our established judicial institutions for the great work of righting the wrongs which prevail in the conduct of our vast and complex system of internal transportation.

The Commission next proceeds with some statements

akin to the foregoing, and apparently based upon Judge Cooley's strange idea of "treating the railroad interests as constituting in a certain sense a section by itself of the political community," and also based upon the cherished vagary that the Interstate Commerce Commission, in some way not clearly defined, is charged with the duty of controlling the development of the internal commerce of the United States. There is no industry or enterprise in this country which is to-day more under the constraint of its environment than is our great railroad system, a fact which I have already attempted to set forth in this communication. Such constraint has reduced the average cost of railroad transportation to one-half what it was in 1870, or in 1873, when I began the serious study of the railroad problem as a governmental question with my beloved friend, the late Secretary, then Senator, Windom. Have the railroad managers made these reductions in rates voluntarily? Oh, no; only upon the compulsion of forces beyond their control; for there is a very wide difference between "all the traffic will bear" and all that railroad managers, loyal to the interests which they serve, would be glad to charge for transportation services. I confidently believe that the country is fast coming to a realization of the indisputable truth that a proper application of the rule of "charging what the traffic will bear" implies commercial freedom and commercial enlargement, and that an artificial governmental rule for determining rates implies commercial enslavement and commercial paralysis.

There is a manifest contradiction of sentiment and of argument in passages on pages 9 and 10 of the "Suggestions," which has been brought to my attention in a memorandum in the humorous vein, sent to me by a friend, copy enclosed. It relates to the solecism of proposing on one page that the Commission shall attempt to direct

the commercial development of the country, and on the next page conceding that the operation of economic and commercial forces is doing that very thing.

The Impolicy of Granting Judicial Powers to the Interstate Commerce Commission.

The argument presented by the Commission in their "Suggestions" in favor of the proposition of granting to them judicial function is not only inconclusive, but it bears unmistakable evidence of the utter impracticability of their contention in this regard. The chief objections to granting to them such function are as follows:

First. The Commission has failed to adduce one iota of evidence in order to prove that such an arrangement as that which it proposes would be acceptable to the Supreme, circuit, and district court judges of the country. Surely, enough has transpired in order to prove that the Federal judiciary is sternly opposed to such an invasion of its province. The judicial power in the United States is a very exclusive power. It tolerates "no brother near the throne." How unwise would it now be to stir up strife between co-ordinate branches of the Government, where harmony has reigned for an hundred years. Such a political schism would be outrageous.

The Commission concedes (Suggestions, page 11) that under our system of government the delimitation of regulative and judicial functions "pertains to the judiciary." Is it not passing strange, then, that the Commission should in the very same connection refuse to submit to the evident decision of the judiciary, in regard to this very matter, and apply to Congress for power to override the courts?

Second. The Commissioners appear to have shut their

eyes to the great historic fact that the union of executive and judicial function in one office is a distinguishing characteristic of autocracy, and that the absolute separation of the executive function from the judicial function is a distinguishing characteristic of free government. Said Hamilton in the *Federalist:* "There is no liberty if the power of judging be not separated from the legislative and executive powers," and Judge Story adopts this identical language.

Third. The Commission makes a labored effort to prove that its present contention is not for judicial power; but I think that in this it clearly stultifies itself. It contends for the right to try a case of infraction of the provisions of the Act to Regulate Commerce, according to the forms and "rules of evidence prevailing in the courts," and "surrounded with all the safeguards which apply in courts," to issue orders upon such decisions to re-try the case if ordered to do so by the court of appeal "for the admission of further evidence," or "investigation on any subject," and then, upon a second appeal, the Commission's decision is to be reviewed by the courts only upon the record as thus made by the Commission. If this is held not to be judicial power and judicial proceeding, then I think it will be quite in order for almost any one to recur to "Story, the *Federalist,* and other elementary works," in order to ascertain just what constitute the essential elements of judicial power and judicial proceeding. The protest of the Commission appears to be similar in character to that of the lady who sternly objected to having a certain mixture called *punch,* for the reason that it had no nutmeg in it.

Fourth. The Commission refers to the incidental authority of courts over the assessment of taxes and over the apportionment of the expenses of a drainage system by a

State under special legislative requirements, and attempts to project therefrom a conclusion in regard to the regulation of the enormous commercial, industrial, and transportation interests of this great and powerful nation. This appears to be without force.

In this connection the fact may be noticed that a good deal of the reasoning of the Commission and of the Committee on Reasonable Rates of the Convention of Railroad Commissions is based upon deductions from *quasi* judicial to judicial functions. This I hold to be inconsequential. *Quasi* judicial means a thousand things—judicial means but one thing. Besides, the distinction attempted to be drawn by the Commission between judicial power and judicial function must, I think, be regarded as a distinction without a difference.

Fifth. A far more serious objection presents itself to this appeal of the Interstate Commerce Commission for judicial function, viz., the fact that it is coupled with the avowed purpose of thereby securing the power of rate-making, and made a stepping-stone thereto. That, as I have attempted to show, is opposed to sound views of public policy. It is monstrous. It would be a flagrant prostitution of the judicial power in the United States, and it goes in the face of fundamemtal principles of free government upon which our political institutions are founded.

Rate-making, like every other conceivable commercial transaction, gives rise in controverted cases to judicial inquiry and judicial determination, but the proposition to conduct any branch of the commerce of this country under judicial supervision and control is an unspeakable absurdity.

Sixth. No sort of question can possibly arise as to the personal fitness of the learned gentlemen who fill the office

of Interstate Commerce Commissioners to perform the coveted function of master in chancery, and it is said the presumption has been raised by the President of the United States that they are all, as lawyers, qualified for the position of justice upon the bench of the Supreme Court of the United States. The fatal objection to the proposition of the Commissioners is that it would empower them to perform two functions, involving totally different operations of the human mind. The very infirmities of human nature bear witness against such a duality of function. This fact the Commission clearly expressed at page 106 of their third annual report, in the following words:

"There is also in the public mind a sense of incongruity between the prosecuting function, involving as it does detective methods and an attitude of hostility, and the judicial function."

In the same connection the Commission alluded to the fundamental principle "that no prosecutor in a transaction should be allowed to become a judge in the same." These expressions are entirely in harmony with the constitutional exposition of Hamilton in the *Federalist*, that "there is no liberty if the power of judging be not separated from the legislative and executive powers." The Commission now sadly stultifies itself in asking for a function involving a moral and intellectual straddle repugnant to our form of government.

It seems strange that the Commissioners should so far have departed from the sound doctrine regarding their procedure, which is expressed in the chapter of their third annual report, entitled "How the act has been administered." They seem to have entirely abandoned a caution which then expressed itself in the words "misdirected energy may render a law nugatory." Apparently the Com-

missioners have fallen into this fatal error. This entire chapter of their third annual report is a much better refutation of their present position as to judicial function than anything which I could write. What is the evident and only possible meaning of such expressions as this : "Such prosecutions as these must take place before the United States courts. *They are not cognizable before the Commission.*"

I beg leave to suggest that the judicial side of just and efficient regulation can perhaps be amply provided for in the form of a technical judicial tribunal such as has been established in Great Britain. As it is my purpose to make this a subject of special inquiry in England and in other countries of Europe during the present summer, I do not care to say very much in regard to it at the present time, especially as I have communicated to you verbally my views upon the subject.

Answers to Objections.

And now I come to what the Commission have to say about my argument. The assertion as to the irrelevancy of what I have said touching the question of granting judicial powers to the Commission is, for reasons above stated, a clear begging of the whole question.

The assumption that my views on the legal and constitutional question are derived from the assertions of the legal gentlemen who appeared at the hearing is erroneous, as my argument was handed to you, Mr. Chairman, for your personal criticism before I had had an opportunity of reading any one of the able legal arguments presented in the case by those gentlemen, with none of whom I had any personal acquaintance or communication.

The reference of the Commission to the case of the

Shipping Commissioners is unfortunate. In correcting the original mistake of an incongruous association of executive and judicial functions another mistake was made. Apparently in order to place the care of seamen entirely clear of judicial authority, the error was committed of giving to the Commissioner of Navigation, a subordinate officer to the Secretary of the Treasury, the power to interpret certain laws and to make his decision relative thereto final. I have submitted this matter to the most competent authority in the Treasury Department, and am told that it is regarded as a legislative crudity. It is entirely anomalous. I am sure that neither the Secretary of the Treasury nor any of his law officers assume that he is endowed with the authority of final interpretation of any law, to the exclusion of judicial interpretation, and I do not think the Commissioners will be willing to openly oppose this view of the case, although they do attempt to draw all the comfort they can from it in order to sustain their present untenable position.

My argument and what I have here said constitute, I think, a very full and complete refutation of the charge that I oppose any governmental regulation of the railroads "except, perhaps, to legalize pooling."

The quotation from my argument near the bottom of page 19 of the "Suggestions," and upon which the Commission sharply animadverts, expresses the same thought which is expressed by the Commission in a paragraph on page 10 of the "Suggestions," beginning with the words "It is freely conceded," etc.

It is an indisputable historic fact in the development of the American railroad system that the commercial and industrial forces of the country have at times gotten the better of the railroad managers, as I have stated in the above-mentioned paragraph, and I think it will not be de-

nied that there was an urgent public demand that the railroad managers should put a stop to the ensuing disorder. Besides, the Interstate Commerce Commission has an hundred times expressed the opinion that this duty does devolve upon the companies, and that they should perform it by entering into agreements as to competitive rates, and by maintaining agreed rates. Besides, the Commission has been instrumental in securing an amendment to the Act to Regulate Commerce enabling and compelling the companies to maintain rates, and thus to preserve the orderly conduct of the transportation interests of the country. Clearly the Commission stultifies itself in its attempt to turn my argument against me.

The Convention of Railroad Commissioners of April, 1892.

I think that every intelligent student of the railroad problem will concede that the report of the Committee on Reasonable Rates of the Convention of Railroad Commissioners, recently held in this city, is against the facts and against the logic of the facts, and about twenty years behind the time as an argument. In this report the remarkable statement is made that our grand and beneficent American railroad system is a source of danger to the public interests, that it exercises unlimited and autocratic powers over the commerce of the country, that it can control the politics of the country, and that the burden of transportation has in consequence increased fifty per cent. during the last twenty years. These statements are not only absolutely erroneous, but absurd to the last degree. They are negatived by the experiences and observations of the intelligent peoples of this country. The irrefutable and clearly apparent facts in the case are that

the American railway system is the result of an evolution which has placed restraints of the most wholesome and beneficial character upon corporate management, that it curtails corporate power, that it has not and never has had any power of united action upon the politics of this country, and that during the last twenty years the cost of railroad transportation has decreased fifty per cent. There has also been developed under our railroad system a sharper and more pervading competition in the conduct of transportation than the world ever saw before even on free highways of commerce. This stress of competition is constantly tightening. If the railroad commissioners of this country shall ever unite in recommending the disruption of the American railroad system, with all its developed elements of competition, with its restraints upon the conduct of railroad management, and with all the innumerable benefits which it confers upon the commercial, industrial, and social interests of this country, such recommendation will surely meet an indignant protest from every part of this land and evoke an instant demand for the abolition of every railroad commission so utterly blind to the public interests.

The force of the recommendations of this Committee to Congress in favor of the present contention of the Interstate Commerce Commission is, however, marred by the fact that four members of the Interstate Commerce Commission made solicitous appeals in favor of the endorsement of their claim before Congress. This would be clearly revealed by a verbatim report of such speeches. I think that the reported resolutions would have met with great opposition and perhaps defeat if the fact had not been urged that the resolutions do not necessarily involve governmental rate-making, although the report itself is full of it. It remained for the delegate from Virginia to interpose a

stern protest to the whole proceeding—a protest of which I believe he will hereafter have reason to be proud.

The report of the Committee is based upon assumptions and views as to the public character and relationship of the railroads which are absolutely fallacious and no longer regnant in the public mind.

Conclusion.

It seems astonishing that the Interstate Commerce Commission should have had recourse to such impracticable expedients and to such illogical and inconsequential arguments in order to sustain its position. The main difficulty with the members of the Interstate Commerce Commission is that they have apparently felt compelled under the provisions of a tentative statute to have recourse to methods which the lessons of experience have proved to be unwise. At last they find themselves hemmed in by insurmountable barriers. In their "Suggestions" they have fully and freely stated the fact that they are in distress. I sincerely regret their confessed failure to accomplish the fundamental objects of the Act to Regulate Commerce. But the efforts of the Commissioners have not been entirely in vain. An investigation is always in the nature of groping one's way out of the darkness into the light. Their efforts have blazed a line of preliminary survey which will surely aid in reaching a final location. This is a result I think which you, Mr. Chairman, had clearly in view in the beginning. Experience in the administration of the law has developed its defects and pointed to the necessity for broader and more practical methods of regulation.

There is one important fact which I think the experience of the Commission has brought to view beyond any possible question, viz., that on the line which they are

pursuing it is impossible by detective methods and by penal prosecutions to prevent secret violations of rate agreements under the protean forms through which, and the innumerable expedients by which, such offences can be and are committed by shippers and railroad agents throughout this broad land of ours. There is, however, a sound method of suppressing these most prevalent causes of unjust discriminations and of commercial disorder, and that is by removing the inducement to commit such offences through agreements as to an equitable share of the competitive traffic which shall be carried by each road. That measure of self-control will eliminate destructive competition, and it will not deprive the public of the benefits of a conservative competition which is all-pervading and constantly operative through commercial forces and through the facilities afforded by our grand American railroad system. Without any sort of governmental interference such competition is constantly tending toward a parity of prices and of freight charges. It is an encouraging sign of progress on the part of the Commission that at last it has come to the conclusion that the plan of securing the orderly conduct of the transportation interests of the country through agreements as to the division of traffic "may be worthy of the serious attention of Congress." See "Suggestions," page 19.

The great difficulty with the Interstate Commerce Commission is that it does not seem to appreciate the potentiality and the vast powers for good involved in the organic characteristics of the American railroad system under the combined control of railroad managers and of commercial and industrial forces. The present policy of turning the cold shoulder upon railroad self-government while attempting to secure for the Commission plenary powers for managing the railroad traffic of this country is, as a regu-

lative proceeding, in the nature of holding fast at the spiggot and letting go at the bung-hole.

Although the matter of self-government is one which clearly devolves upon the railroad companies of the country, they should be encouraged in the work and, within proper bounds, be urged to it by the Government. I refer specifically and only to such measures of self-government as are clearly in restraint of a competition which invariably runs to commercial disorder, and also in restraint of practices which are to-day recognized by the Interstate Commerce Commission and by the people generally as inimical to the public interests.

This is a subject in which I have taken a deep interest ever since I entered upon the active duties of life. It is a trite saying that we have government by discussion. I love fair and vigorous discussion of public questions, and it is in this spirit that I have joined in the present debate, with an abiding faith that a thorough discussion will surely lead to right conclusions.

I am, sir, very respectfully yours,

JOSEPH NIMMO, JR.

1831 F st., WASHINGTON, D. C.,
June 6, 1892.